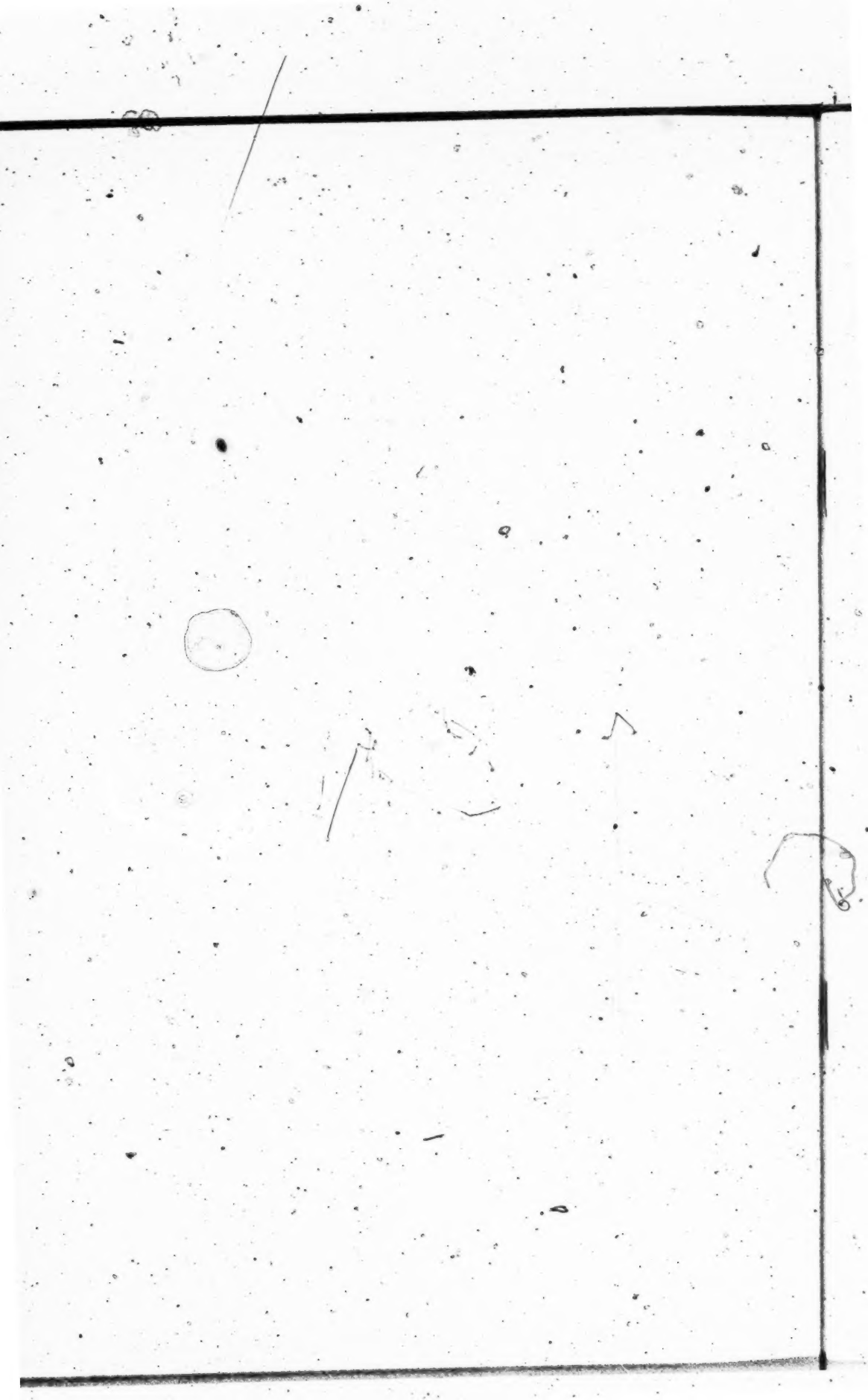

SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 700

BROOKS LEE ANDERSON,

Petitioner,

v.

WILBURN C. JOHNSON, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Question Presented	4
Statement	5
Summary of Argument	8
Argument	10
Conclusion	19

TABLE OF AUTHORITIES CITED

CASES:

Bachman v. *Crawford*, 22 Tenn. 213 (1843) 11
Brown v. *Allen*, 344 U.S. 463, 92 L. ed. 76 (1947) 13
Coleman v. *Alabama*, —— U.S. ——, 88 S. Ct. 2, 36 L. Wk. 3160 (1967) 10
Faxon Hills Const. Co. v. *United B'hd of Carpenters*, 168 Ohio St. 8, 151 N.E.2d 12 (1958) 14
Hall v. *State*, 65 Tenn. 522 (1873) 11
Kennedy v. *State*, 186 Tenn. 310, 210 S.W.2d 132 (1948) 9, 11, 17, 18, 19
La Fever v. *United States*, 257 F.2d 271 (7th Cir. 1958) 14
New Amsterdam Casualty Co. v. *Waller*, 323 F.2d 20 (4th Cir. 1963) 14
Norris v. *Alabama*, 294 U.S. 587, 79 L. ed. 1074 (1935) 18
Patton v. *Mississippi*, 332 U.S. 463, 92 L. ed. 76 (1947) 13

Page

Pitcairn v. *American Refrigerator Transit Co.*, 101 F.2d 929 (8th Cir. 1939) 14

Restifo v. *Pastor*, 129 A.2d 533 (D.C. Mun. Ct. App. 1957) 14

Scott v. *Walker*, 358 F.2d 561 (5th Cir. 1966) 13

Searcy v. *Short*, 69 Tenn. 749 (1873) 11, 12

State v. *Bryant*, 18 Tenn. 527 (1837) 11

Swain v. *Alabama*, 380 U.S. 202, 13 L. ed.2d 759 (1965) 16, 17

Whitus v. *Georgia*, 385 U.S. 545, 17 L. ed.2d 599 (1967) 10, 15

CONSTITUTIONAL PROVISIONS AND STATUTES:

Constitution, Amendment 14, § 1 ..... 2, 13

28 U.S.C. 1254(1) 2

Private Acts of Tennessee with Extra Session, 1913, Chapter 45 ..... 4, 13

Williams Tennessee Code of 1932, § 10006 ..... 2, 6, 11

Williams Tennessee Code of 1932, § 10007 ..... 4, 6

Williams Tennessee Code of 1932, § 10009 ..... 3, 6

Williams Tennessee Code of 1932, § 10010 ..... 3, 6

Williams Tennessee Code of 1932, § 10011 ..... 3, 6

MISCELLANEOUS:

31A C.J.S. Evidence, § 299 14

Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966) 15

Siegel, *Nonparametric Statistics for the Behavioral Sciences* (McGraw-Hill 1956) 15

9 Wigmore, *Evidence*, "Judicial Admissions" (1964 Supp.) 14

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Opinions Below

The opinion of the District Court for the Middle District of Tennessee is unreported. The opinion of the Court of Appeals for the Sixth Circuit is reported at 371 F.2d 84. A conformed copy of the portions of the opinion of the District Court relevant to the question presented herein is found in the Appendix heretofore filed at pp. 57-59; the opinion of the Court of Appeals for the Sixth Circuit is found in the Appendix at pp. 61-100.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for certiorari was filed on March 21, 1967, and was granted on October 9, 1967.

Constitutional Provisions and Statutes Involved

The Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 10006 of Williams' Tennessee Code of 1932, setting forth the general qualifications of jurors at the time of Petitioner's indictment, trial and conviction (1949), as follows:

> Every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this Code. Williams Tenn. Code (1932), § 10006. (Subsequently substantially changed—see Tenn. Code Ann. § 22-101.)

Sections 10007 and 10009-10011 of Williams' Tennessee Code of 1932, setting forth the grounds for disqualification for, and exemption from, jury service at the time of Petitioner's indictment, trial and conviction, as follows:

Incompetent persons.—Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors. Williams Tenn. Code (1932), § 10009; now Tenn. Code Ann., § 22-102.

Occupational and disability exemptions.—The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five (65) years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state. Service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state. Williams Tenn. Code (1932), § 10010; now Tenn. Code Ann., § 22-103.

Excuse from service.—Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when, for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance. Williams Tenn. Code (1932), § 10011; Tenn. Code Ann., § 22-104.

Disqualification by interest or relationship.—No person can act as a juror in any case in which he is inter-

> ested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by civil law, except by consent of all the parties. Williams Tenn. Code (1932), § 10007; Tenn. Code Ann., § 22-105.

Chapter 45, § 5, Private Acts of Tennessee with Extra Session, 1913, setting forth the method of selection of the general venire by the Jury Commissioners of Maury County, as follows:

> Be it further enacted, that it shall be the duty of the Jury Commissioners biennially on the first Monday in July, or upon the call of the Chairman, upon any day within thirty days thereafter, to meet and select from the tax books of the county and from any reliable sources the names of upright, intelligent men, known for their integrity, fair character, and sound judgment, from the various civil districts of the county and in proportion to the population of such districts, as near as may be, possessing the qualifications as required by law . . . .

Question Presented

Whether Negroes were systematically excluded, because of their race, from the grand jury which indicted Petitioner, a Negro, and from the petit jury which convicted him, in violation of the rights secured to him by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioner was arrested in Maury County, Tennessee on April 21, 1949, upon a warrant charging him with rape. On May 23, 1949, he was indicted for rape by the grand jury of Maury County (A. 10-11). At some later date, approximately one month prior to Petitioner's trial, Pride Tomlinson, Jr. of the Maury County Bar, was appointed to represent him (A. 48). Petitioner was tried and convicted of rape on August 1, 1949 (A. 13-14).

On June 12, 1962, Petitioner filed a petition for habeas corpus in Division Two of the Criminal Court for Davidson County, Tennessee (A. 15-16), alleging, *inter alia*, a denial of the rights secured to him by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States because of the systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which tried and convicted him. This petition was denied without a hearing on December 7, 1962 (A. 17-18). An appeal to the Tennessee Supreme Court resulted in an affirmance on May 8, 1963 (A. 19).

Petitioner, on August 31, 1963, filed a petition for habeas corpus in the United States District Court for the Middle District of Tennessee, again alleging the systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which convicted him (A. 20); this allegation was repeated in an Amended and Supplemental Petition filed by his court-appointed attorney (A. 21-22). A hearing was held in the district court on July 7, 1964. In an order entered November 10, 1964, the district court held that Petitioner "failed to establish a prima facie case of purposeful discrimination or exclusion of qualified Ne-

groes from the grand and petit juries of Maury County during 1949," and that even if a prima facie case had been presented, Respondent had carried his burden and rebutted Petitioner's case (A. 57-59).

Notice of Appeal was filed in the District Court on November 23, 1964 (A. 60). A hearing was held in the Court of Appeals for the Sixth Circuit on April 19, 1966; and on December 22, 1966, an opinion was entered affirming the judgment of the district court (A. 61-100). Phillips, J., speaking for the majority, held that a prima facie case of systematic exclusion had been presented by Petitioner but that the Court could not denominate "clearly erroneous" the district court's finding that Respondent had rebutted Petitioner's prima facie case. McAllister, J., dissented, stating that he did not think that Petitioner's prima facie case had been rebutted.

The general qualifications for jurors in Tennessee at the time of Petitioner's indictment and trial were found in § 10006 of the Williams Tennessee Code of 1932, quoted *supra* at 2; every adult male freeholder or householder was qualified, if not ineligible under the express disqualification provisions of Sections 10007 and 10009-10011, quoted *supra* at 3-4.

In July 1948 the three Jury Commissioners for Maury County selected 1501 persons who constituted the general venire for the biennium ending June, 1950 and whose names were placed on separate scrolls in the "Jury Box" (A. 46). Prior to the beginning of each term of court (there were three terms per year—A. 39), "a boy under the age of ten (10) years drew one hundred names from the Jury Box to constitute a panel" (A. 9). This panel

of one hundred persons is called the venire facias (A. 9). Between the time of selection of the 100 members of the venire facias and the beginning of the term, claims of exemption and requests for excusal were presented to the presiding judge and acted upon (A. 40, 52). Then, on the first day of the term the remaining names of the venire facias "were placed on separate scrolls and placed in a hat [and] according to law were drawn in open Court by a boy under the age of ten years" (A. 9). The first 13 names drawn constituted the grand jury. The remaining members of the venire facias were available for petit jury service during the term.

In 1940 the Negro population of Maury County was 10,130, which was 24.99 per cent of the total population; in 1950 these figures were 8,579 and 21.2 per cent (A. 23). Among adult males, there were 2,918 Negroes (24.70 per cent) in 1940 and 2,486 in 1950 (20.79 per cent) (A. 24). There was no testimony that Negroes in Maury County are any less qualified for jury service than whites. Indeed, there was testimony at the habeas corpus hearing in the district court by the man who was District Attorney General of Maury County at the time of Petitioner's indictment and trial that there was "many, many" substantial Negro businessmen in Maury County at that time (A. 42-43).

No Negro served on either the grand jury which indicted Petitioner or the petit jury which tried him (A. 41, 42, 52). All of the evidence adduced in the district court was to the effect that prior to and including the time of Petitioner's indictment and trial no Negro had *ever* served on either a grand or petit jury in Maury County, Tennessee. Such evidence included the testimony of (1) a

Negro civil rights leader in Maury County in the 1940's (A. 32, 35); (2) the District Attorney General for Maury County at the time of Petitioner's indictment and trial (A. 42, 43); (3) the attorney who represented Petitioner at his trial (A. 52, 53); (4) the Sheriff of Maury County at the time of Petitioner's indictment and trial (A. 55-56); and (5) a deputy sheriff at that time (A. 57). The Circuit Judge who presided at Petitioner's trial testified by affidavit under 28 U.S.C. 2245; he did not respond directly to the contention that no Negroes had ever actually served, but instead listed twenty-two Negroes (A. 46, 47) whose names appeared on the 1948 general venire and which he stated he had found by a "casual examination" of the general venire (A. 46).

The District Attorney General attempted to explain the fact that Negroes had never served on any grand or petit jury by saying that "they weren't willing to serve, they wanted off" (A. 40); "they would beg off" (A. 42); and the judge would excuse them even though they had no legal excuse because "he was very understanding" (A. 43). He was seconded in these assertions by Petitioner's former attorney (A. 50, 52).

Summary of Argument

Petitioner has made out a clear prima facie case by showing that no Negro had ever served on any grand or petit jury in Maury County prior to (and including) the time of his indictment and trial.

Respondent contends that the evidence does not show that any Negroes were qualified to serve as jurors. In fact,

the evidence shows that more than twenty per cent of the persons qualified were Negroes. Moreover, Respondent has the burden to show that no Negroes were qualified and has introduced no evidence on this point. Finally, if very few Negroes were qualified under the Tennessee statute, when Negroes comprised more than twenty per cent of the population, then the statute is unconstitutional.

Respondent contends that the evidence shows that there was no systematic exclusion in the selection of the general venire. In fact, the proof shows, to a mathematical certainty, that there was systematic exclusion.

The practice of the Circuit Judge for Maury County of excusing all Negroes who were summoned for jury duty, whether or not they had a legal excuse, constitutes systematic exclusion.

The case of *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), which involved the question of systematic exclusion of Negroes in Maury County in 1946, is entitled to be given no weight by this Court. It is the duty of a federal court to make an independent investigation where the violation of a federal right is claimed. Further, the Tennessee Supreme Court in *Kennedy* applied the wrong tests in reaching its conclusion, and the decision is demonstrably erroneous. And since *Kennedy* involved a different jury panel from that challenged here, its only possible relevance is of the question of whether Negroes had ever actually served; and the proof in *Kennedy* was uncontradicted that none had ever served.

Argument

It is absolutely certain that Petitioner has made out a strong prima facie case of systematic exclusion by showing that no Negro had ever served on either a grand or petit jury in Maury County prior to his indictment and conviction, and that there were none on the grand jury which indicted him nor on the petit jury which convicted him. *Coleman* v. *Alabama*, —— U.S. ——, 88 S. Ct. 2, 36 L. Wk. 3160 (Oct. 16, 1967), and cases cited therein. And "once a prima facie case is made out the burden shifts to the prosecution" (*Whitus* v. *Georgia*, 385 U.S. 545, 17 L. Ed.2d 599, 605 (1967)) to adduce evidence "adequate to rebut Petitioner's prima facie case." *Coleman* v. *Alabama, supra.*

Respondent's attempted rebuttal consists of the following contentions:

1. That Petitioner has failed to prove that there were any Negroes who met the statutory qualifications for jurors.

2. That the proof shows that the names of at least twenty-two Negroes appeared on the general venire of 1501 names selected by the jury commissioners, from which list were selected the grand jury which indicted Petitioner and the petit jury which convicted him. Respondent also questions, on a judicial admission theory, the right of Petitioner at this time to raise any question with respect to the selection of the general venire and the number of Negroes thereon.

3. That the names of Negroes in fact appeared on the venire facias of one hundred names selected each term

from the general venire; but that they always asked to be excused, which request was granted because the judge was understanding and sympathetic to such requests.

4. That this Court should follow the decision of the Tennessee Supreme Court in *Kennedy* v. *State,* 186 Tenn. 310, 210 S.W.2d 132 (1948), to the effect that there was no systematic exclusion of Negroes in Maury County some three years prior to Petitioner's indictment and trial.

Petitioner will discuss separately each of Respondent's contentions.

1. Percentage of Qualified Negroes

The relevant statutory qualifications for jury duty were that one be an adult male freeholder or householder. *Williams' Tenn. Code* § 10006 (1932). A "freeholder" is, of course, an owner of realty, *State* v. *Bryant,* 18 Tenn. 527 (1837); and a "householder" is simply the head of a family. *Hall* v. *State,* 65 Tenn. 522, 526 (1873).[1]

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[1] It is not necessary for one to be married to be a householder, nor for any children living with him to be his own. *Hall* v. *State,* 65 Tenn. 522, 526 (1873). Nor are children necessary. *Searcy* v. *Short,* 69 Tenn. 749, 751-52 (1873) [a case under a statute exempting from execution certain property belonging to the "head of a family"—the Tennessee Supreme Court has discussed decisions involving "householders" as being relevant in these cases. See, *e.g., Bachman* v. *Crawford,* 22 Tenn. 213, 216-17 (1843)]. In *Searcy* v. *Short, supra,* the Tennessee Supreme Court stated that in order to qualify as "head of a family" one must "have a family circle, that is, wife *or* child *or* other similar relations at a place of residence, within his own home or house, or in some one else's house over whom he or she exercises the control, and over which he has the direction as the head. The very idea of family is plural—carries with it the notion of more than one—and such parties occupying a peculiar social relation to each other. There must be a home, a family circle at that house of one or more under his control; that

In 1940, the total Negro population of Maury County was 10,130 or 24.99 per cent of the total population (A. 23); and the adult Negro male population was 2,918, or 24.70 per cent of the total adult male population. (A. 24) In 1950, the figure for all Negroes was 8,579, or 21.2 per cent, and for adult Negro males 2,486 or 20.79 per cent. (A. 23, 24) The Bureau of Census does not further subclassify adult males by race in any way relevant to the further statutory qualifications, freeholders or householders.

Is this proof sufficient to require a conclusion that there were many Negroes who met the statutory requirements for jury duty? Of course. The only adult males not qualified, aside from the disqualification statutes, would seem to be, generally, bachelors living alone or with someone who is not dependent on them. At any rate, it is obvious from the broad categories of the statutory qualification that the great majority of adult males of both races met such qualifications and were eligible for jury duty. Indeed, even a cursory reading of the proof shows that a basic assumption of all of Respondent's witnesses, including the presiding judge, the prosecuting district attorney and Petitioner's defense attorney, was that there were many Negroes eligible for jury service at the time of Petitioner's indictment and conviction. (A. 38-54) Petitioner contends that in the absence of proof to the contrary, this Court should presume that the percentages of adult males eligible

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home may be the occupation of an entire house, or it may be of a single room . . . ." 69 Tenn. at 751. (Emphasis added.)

Thus, in order for one *not* to be a householder, he must live alone or with persons who do not constitute a family circle of which he is the head. There is, of course, no proof, or reason to believe, that any greater percentage of adult Negro males than adult white males live in such fashion.

for jury duty, by race, are the same as those percentages of adult males, by race, *i.e.*, 20.79 per cent Negro and 79.21 per cent white (using the 1950 figures).[2]

Furthermore, since Petitioner has established a prima facie case, the burden is on Respondent to show that less than 20.79 per cent of the eligible jurors were Negro. Since he has introduced no evidence whatever on this point, that percentage must be taken as proved.

2. Selection of General Venire

In July, 1948 the Jury Commissioners of Maury County selected "from the tax books of the county and from any reliable sources the names of [1501] upright, intelligent men, known for their integrity, fair character and sound judgment . . . ." Private Acts of Tennessee of 1913 with Extra Session, C. 45 § 5. (A. 46) These 1501 men constituted the biennial general venire, from which were selected three times each year (admittedly at random) a panel of 100 names (venire facias), from which, in turn,

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[2] If we assume that there were no Negroes eligible for jury duty, or very few, the petition must still be granted; in that event the statute setting forth the qualifications for jurors would itself be invalid because violative of the Equal Protection clause of the Fourteenth Amendment: "'When a jury selection plan, *whatever it is*, operates in such a way as always to result in the complete and long continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.' *Patton* v. *Mississippi*, 332 U.S. 463, 469, 92 L. ed. 76, 80 (1947) . . . . The inclusion of a minimal or token number of Negroes on a jury list does not prevent the systematic exclusion rule from operating, for the Supreme Court has said in *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. ed. 469: 'Of course, token summoning of Negroes for jury service does not comply with equal protection . . . . [citing cases].'" *Scott* v. *Walker*, 358 F.2d 561, 571 (5th Cir. 1966). (Emphasis added.)

grand jurors and petit jurors for each term were chosen. (A. 9, 39)

Petitioner contends that from the proof in the record the conclusion is inescapable that Negroes were systematically excluded in the selection of the general venire.[3] Aside from the usual self-righteous denials, which are of no probative value, the only rebuttal evidence introduced by Respondent in an attempt to overcome Petitioner's prima facie case was the naming of twenty-two Negroes whose names appeared on the general venire.[4] As shown above, the record in this case requires the conclusion that at the time of Petitioner's indictment and conviction, 20.79 per cent of those persons eligible for jury duty were Negroes. The

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[3] Respondent has questioned whether Petitioner can now challenge the selection of the general venire because he did not press this point in the Court of Appeals. Respondent contends that this constitutes a judicial admission that there was no systematic exclusion in the selection of the general venire. But it is manifest that the doctrine of judicial admissions applies only to facts and not to legal conclusions. 9 Wigmore, *Evidence*, Judicial Admissions § 2590, 1964 Supp. at 319; *New Amsterdam Casualty Company* v. *Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963); *La Fever* v. *United States*, 257 F.2d 271 (7th Cir. 1958); *Pitcairn* v. *American Refrigerator Transit Co.*, 101 F.2d 929, 935 (8th Cir. 1939); *Faxon Hills Const. Co.* v. *United B'hd of Carpenters*, 168 Ohio St. 8, 151 N.E.2d 12, 14 (1958); *Restifo* v. *Pastor*, 129 A.2d 533, 535-36 (D.C. Mun. Ct. App. 1957); 31A C.J.S. *Evidence*, § 299 at 765, and cases cited therein. There is no authority to the contrary.

[4] Respondent contends that the record shows merely that there were *at least* twenty-two Negroes on the general venire, not that there were only twenty-two. But this completely overlooks the fact that the burden of proof is on Respondent to rebut Petitioner's prima facie case. Second, one wonders whether there is any such thing as a "casual" examination of a list of 1501 names to determine the race of those named (as was claimed to have been made by the trial judge—A. 46), especially in light of the fact that a Negro civil rights leader in the county had never heard of half of those Negroes listed by the judge as being on the general venire (7 of the 14 he was asked about—A. 34-36).

probability[5] that a random selection of 1501 names from such a population will produce no more than 22 Negroes is $.974 \times 10 - 72$, or .00000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000974. Petitioner would respectfully suggest that the proof shows that the selection of the general venire was not random.

Respondent having offered no further explanation, the conclusion of systematic exclusion in the selection of the general venire is inescapable.

3. Excusing Prospective Negro Jurors

Respondent's proof shows that the venire facias of 100 names (which, Petitioner admits, were selected at random from the general venire of 1501 names) never contained the names of more than three Negroes[6] (A. 52). The explanation proffered by Respondent as to why no Negroes had ever served on either a grand or petit jury was that those called "would beg off" and be excused from service (A. 42-43, 40, 50, 52). To repeat, Respondent has the burden of rebutting Petitioner's prima facie case, and this can be discharged only by explaining satisfactorily the

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[5] Siegel, *Nonparametric Statistics for the Behavioral Sciences*, "The Binomal Test" at 36-42 (McGraw-Hill 1956). Counsel wishes to express his appreciation to Dr. Richard L. Gorsuch and The Vanderbilt University who generously donated his time and knowledge and its computer, respectively, to make this calculation. And see *Whitus* v. *Georgia*, 385 U.S. 545, 17 L.ed.2d 599, 605 n. 2 (1967); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

[6] This is further proof of systematic exclusion in the selection of the general venire, as set forth in 2, *supra*. Assuming that 3 per cent of the general venire were in fact Negroes (45 men, as opposed to the 22 shown by the proof), the probability of the random selection of no more than 45 Negroes in the general venire is $.42 \times 10 - 64$. *Ibid.*

reason why no Negro had ever served. Perhaps this particular "explanation" (the only one proffered) can best be handled by simply denominating it as "unsatisfactory." Moreover, even if true that this uniform excusing of Negroes occurred because the judge was "very understanding" (A. 43), serious questions are raised concerning the judiciary's responsibility in such a situation. It has certainly been true that few Negroes in rural Southern communities have gone out of their way to offend whites. And if it is generally known throughout a community in which Negroes have never served that the judge uniformly excuses Negroes from jury service even though they do not have legal grounds for being excused (A. 43), the effect upon the two or three Negroes summoned for jury service is apparent. The only step which is susceptible of judicial correction in this sequence of events resulting in non-service by Negroes is that of the excusing of prospective jurors by the judge. A rule requiring the judge to exercise his discretion so as *not* to excuse Negroes (or whites either) except where good cause is clearly established seems called for.[7]

Respondent relies on the case of *Swain* v. *Alabama*, 380 U.S. 202, 13 L.ed.2d 759 (1965), as authority for the proposition that the "systematic excusing" shown by this record does not amount to systematic exclusion. In fact, *Swain* is strong authority for Petitioner's position. There the Court clearly stated that proof of the use of the peremptory challenge (as embodied in Alabama's "struck jury"

[7] It should be noted that this line of reasoning in no way impugns the motives of the judge who receives requests to be excused. The proposed rule is simply the only practical solution to a difficult practical problem.

system) by a prosecutor over a period of time, with the result that no Negroes ever served on criminal juries,

> "might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.' These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. at 224, 13 L.ed. 2d at 774.

The Court in *Swain* merely held that proof of challenging all Negroes in a *particular* case would not support a holding of systematic exclusion.[8]

4. Kennedy v. State

Finally, Respondent asks this Court to disregard the overwhelming proof of systematic exclusion shown by this record and to follow the decision of the Tennessee Supreme Court in *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), *cert. denied*, 333 U.S. 846, 92 L.ed. 1129 (1948). The holding there was that there was no systematic ex-

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[8] The Court in *Swain* (380 U.S. at 224-28, 13 L.ed.2d at 775-77) also adverted to the fact that the record showed that many Negro defendants preferred all-white juries and that it was likely that Negro defendants' own attorneys also challenged prospective Negro jurors. There is a very substantial difference between the case of an attorney who, representing a Negro, uses his legal training and experience to challenge a prospective Negro juror and the case of an isolated Negro layman requesting to be excused from jury duty in a county where no Negro has ever served. The Court in *Swain* wisely noted that in systematic exclusion cases, rules should not be "woodenly applied." 380 U.S. at 227, 13 L.ed.2d at 776.

clusion of Negroes from grand or petit juries in Maury County in 1946 despite uncontroverted proof that no Negro had ever served on a grand or petit jury in Maury County.

Of course, it is the duty, not only the right, of the federal courts to make an independent determination of whether a federal right has been violated. *Norris* v. *Alabama,* 294 U.S. 587, 589-90, 79 L.ed. 1074, 1077 (1935).

Kennedy involved the 1944 general venire, and there was no proof as to the number of Negroes thereon, thus distinguishing that case from the case at bar. Moreover, since *Kennedy* involved a different general venire from the one challenged here, it would seem that its only possible relevance here would be on the question of whether Negroes had ever actually served on juries; and the uncontradicted proof in that case was that none had ever served.

The record in *Kennedy* showed that from the 1944 general venire was selected a venire facias of 106 residents of Maury County, 7 of whom (6.60 per cent) were Negroes.[9] There was no proof as to the respective percentages of Negro and White adult males eligible for jury service; therefore, as shown in 1, *supra,* it must be assumed that the percentage of Negroes eligible for jury duty was the same as that of adult Negro males, *i.e.* 24.70 per cent (using the 1940 census figures rather than those for 1950, because the selection of the general venire in *Kennedy* was in the

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[9] The proof actually showed a general venire of 109 containing ten Negroes, but two of the Negroes were dead and one had moved away from Maury County. 186 Tenn. at 316. If a consideration of these three was proper, systematic exclusion could be easily accomplished.

Two of the seven Negroes on the venire facias were excused, and the record was silent as to the other five. *Ibid.*

first half of the decade). The probability[10] that a random selection of 106 names from such a population would produce no more than seven Negroes is .0000009944, that is less than once in a million times. Thus, the Tennessee Supreme Court in *Kennedy* held that tokenism, similar to that shown by the record in this case, satisfactorily rebutted the prima facie case of systematic exclusion; to the contrary, as shown above, the decision in *Kennedy* v. *State* is demonstrably erroneous on its own record. Therefore, even to the extent that it might be considered relevant, it is entitled to be given no weight by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to the Court of Appeals with instructions to remand it to the District Court with instructions that Petitioner be discharged from the further custody of Respondent.

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[10] See fn. 5, *supra*.